CHAPTER V

ECONOMIC, SOCIAL AND CULTURAL RIGHTS

(A COMPARISON OF ESC RIGHTS IN THE INTERNATIONAL BILL OF RIGHTS WITH CORRESPONDING PROVISIONS IN THE DIRECTIVE PRINCIPLES OF STATE POLICY)

Economic, Social and Cultural (ESC) Rights are often accorded a secondary status by governments and NGOs and 'treated with an air of triviality' despite its intrinsic value and in spite of being a part of the normative code of Human Rights. Unlike, Civil and Political Rights, ESC Rights are often viewed with 'suspicion, caution and skepticism'.

However, ESC rights 'expand the freedom to lead a life that we value'.[340] The potentialities of the human person may be expressed through civil and political rights but the unfolding of these potentialities requires adequate social and economic circumstances.[341]

While the concept of 'human dignity' forms the foundation of civil and political and economic, social and cultural rights these rights being 'inherent' can neither be given nor taken away. Human dignity is denied when civil and political rights and economic, social and cultural rights are not guaranteed. Two common elements mediate both sets of rights – security and equality. Security of the person includes socio-economic security and equality before law encompasses equality of opportunities.

The adoption of the Universal Declaration of Human Rights was followed by the drafting of binding human rights treaties. While the Universal Declaration contained both sets of rights, the Commission on Human Rights decided to draft two separate covenants because when the Commission set about its task and drafted a comprehensive covenant incorporating the two sets of rights initially it became clear

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[340] Amartya Sen,Beyond Liberalization:Social Opportunity and Human Capability, Institute of Social Sciences, New Delhi 1994
[341] Yash Ghai, Human Rights and Governance; The Asia Debate, University of Hong Kong (mimeo)

that it would end up having a 'covenant within a covenant.'[342] The implementation systems that were separate for both sets of rights made the draft unwieldy. Therefore, the Economic and social Council (ECOSOC) requested the General Assembly to reconsider its decision regarding having one instrument. The General Assembly accordingly authorized the Commission to draft two covenants.[343] Thus, the idea of drafting two separate covenants stemmed more from the implementation mechanisms and not because of their inherent incompatibility as argued by some scholars.

Further, the development of international human rights law has shown the indivisibility of both the civil, political and economic, social and cultural rights. For example, the Convention on the Elimination of All Forms of Discriminations against Women and the Convention on the Rights of the Child incorporate protection of both sets of rights.

The two Covenant's have different formulations regarding the implementation of rights contained in them. The ICCPR requires that states on ratification respect and ensure protection of the rights contained in the Covenant. On the other hand, the ICESCR[344] requires that the state parties for *progressively achieving the full realization of rights, undertake steps to the maximum of their available resources.* The implication is that the ICCPR requires immediate implementation while ICESCR requires only progressive implementation by taking into account the availability of resources. Consequently, some scholars and states put forth a view that civil and political rights are human rights and economic, social and cultural rights are mere aspirations.[345]

This argument is based on the notion that the existence of a right depends on the existence of a remedy. The argument has no validity since problems in implementation and remedy should not deprive individuals of their rights.[346]

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[342] Mathew Craven, The International Covenant on Economic, Social and Cultural Rights-A Perspective on its Development, Clarendon Press, Oxford 1995 (p.19)
[343] Ibid (p.19)
[344] Refer Annexure V for the full text of ICESCR.
[345] D.J. Ravindran, Human Rights Praxis: A Resource book for Study, Action and Reflection, Earthworm Books, 1998. (p.124)
[346] Rosalyn Higgins, International Law and How We Use It, Clarendon Press, Oxford, 1994.(p.100)

Another common notion regarding civil and political rights is that they are negative rights and do not involve resources or positive intervention by the state; not entirely true since civil and political rights are not always cost free and negative. For example, maintenance of courts and prisons does indeed require resources and positive intervention by the government.[347]

Some scholars argue that since a court cannot provide remedies for non compliance of ESC rights, ESC rights cannot be considered as rights proper. In some areas such as labour rights, courts do intervene and provide relief. However, most often courts consider some other ESC rights issues as policy questions that should be addressed by the executive and not by the judiciary, making this debate inconclusive.

It is pertinent to note that 'The Committee of Economic, Social and Cultural Rights', herein after referred to as 'The Committee', has identified the following provisions of the Covenant as capable of immediate applications by judicial and other organs:[348]

Article 3	**-**	**non-discrimination in the enjoyment of rights**
Article 7(a) (I)	**-**	**fair and equal wages; equal pay for equal work by men and women**
Article 8	**-**	**right to form trade unions and the right to strike**
Article 10(3)	**-**	**protection of children from economic and social Exploitation**
Article 13(2) (a)	**-**	**compulsory primary education**
Article 13 (3)	**-**	**right of parents to choose for their children schools to ensure religious and moral education of their children in conformity with the conviction**
Article 13 (4)	**-**	**right to establish and direct schools**
Article 15 (3)	**-**	**freedom for scientific research and creative activity**

[347] D.J. Ravindran, Human Rights Praxis: A Resource book for Study, Action and Reflection, Earthworm Books, 1998. (p.125)

[348] General Comment 3 (Fifth Session, 1990), Compilation of General Comments and General Recommendations Adopted by the Human Rights Treaty Bodies, UN Document, HRI/Gen/1/Rev.1, July 1994

The Committee by identifying specific articles that may be capable of immediate applications by judicial and other organs has refuted the view that economic, social and cultural rights are not justiciable.

Though the notion of violation applied so vigorously to civil and political rights is normally not used regarding economic, social and cultural rights, The Committee on Economic, Social and Cultural Rights has developed the concept of 'minimum core obligations'. The Committee developed this concept mainly to refute the argument that lack of resources hinders fulfillment of obligations. The Committee has stated that every State has a minimum core obligation to satisfy minimum essential levels of each of the right of the Covenant. The Committee has clarified that a State party 'in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is *prima facie*, failing to discharge its obligations under the Covenant'.[349]

Thus, the doctrine of minimum core content prevents states from taking refuge under the plea that lack of resources hinders fulfillment of her ESC obligations. A group of distinguished experts in international law have developed the 'Limburg Principles' that provide some basic framework to deal with violation of economic, social and cultural rights.[350]

According to the Limburg Principles-

> 'A failure by a State party to comply with an obligation contained in the Covenant is, under international law, a violation of the Covenant.[351]

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[349] D.J. Ravindran, Human Rights Praxis: A Resource book for Study, Action and Reflection, Earthworm Books, 1998. (p.127)

[350] The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, Human Rights Quarterly, Vol.9, No.2, May 1987

[351] A State party will be in violation of the Covenant, inter alia, if:

- It fails to take a step which it is required to take by the Covenant;
- It fails to remove promptly obstacles which it is under a duty to remove to permit the immediate fulfillment of a right;
- It fails to implement without delay a right which it is required by the Covenant to provide immediately;

In determining what amounts to a failure to comply, it must be borne in mind that the Covenant affords to a State party a margin of discretion in selecting the means for carrying out its objects, and that factors beyond its reasonable control may adversely affects its capacity to implement particular rights.

AN OVERVIEW OF ICESCR

Besides the preamble, the Covenant contains five parts. Part I, contains Article 1, dealing with the right of self-determination. This article is identical to Article 1, of the Covenant on Civil and Political Rights. Part II contains Articles 2-5 that are applicable to all the substantive provisions of the Covenant. Part III, contains Articles 6-15 dealing with specific rights. These rights are: the right to work (article 6), the right to fair conditions of employment (article 7), the right to join and form trade unions (article 8), the right to social security (article 9), the right to protection of the family (article 10), the right to an adequate standard of living (article 11), the right to health (article 12), the right to education (article 13), and the right to culture (article 15). Part IV and V deal with a system of supervision and modalities concerning ratification and entry into force of the Covenant.[352]

That one hundred and forty nine State parties ratified the Covenant up to June 2004 gives credence to its universal recognition despite the skepticism surrounding its content.

NON-DISCRIMINATION

Article 2(2) and Article 3 deal with the non-discrimination aspect. Article 2(2) is similar to other instruments in stating that the rights should be enjoyed without

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- It willfully fails to meet a generally accepted international minimum standard of achievement, which is within its powers to meet;
- It applies a limitation to a right recognized in the Covenant other than in accordance with the Covenant;
- It deliberately retards or halts the progressive realization of a right, unless it is acting within a limitation permitted by the Covenant or it does so due to a lack of available resources or force majeur;
- It fails to submit reports as required under the Covenant.'

[352] D.J. Ravindran, Human Rights Praxis: A Resource book for Study, Action and Reflection, Earthworm Books, 1998. (p.129)

discrimination on the grounds of 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

Article 3, on the other hand is more specific. It provides for the 'equal right of men and women to the enjoyment of rights.....set forth in the Covenant.'

The Committee has followed the practice that discrimination is not restricted to those grounds identified under the Covenant and include discrimination based on age, health status or disability.[353] The non-discriminatory clause of the Covenant covers discriminatory acts of both public authorities and private individuals.[354]

The ICESCR does not recognize any particular right to be non-derogable in the manner it is done under the ICCPR[355]. However, Article 4, states that limitations imposed on the enjoyment of rights should be 'determined by law' and should be done solely for the purpose of 'promoting the general welfare in a democratic society.'

Article 2(1) of the Covenant deals with the obligation of States parties under the Covenant. According to the Committee on Economic, Social and Cultural Rights, 'Article 2 is of particular importance to a full understanding of the Covenant and must be seen as having a dynamic relationship with all of the other provisions of the Covenant. It describes the nature of the general legal obligations undertaken by States parties to the Covenant.'[356]

Article 2(1) of the Covenant states that 'Each State party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of available resources, with a view to achieving progressively the full realization of the rights

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[353] Mathew Craven, The International Covenant on Economic, Social and Cultural Rights-A Perspective on its Development, Clarendon Press, Oxford, 1995(p.170)
[354] D.J. Ravindran, Human Rights Praxis: A Resource book for Study, Action and Reflection, Earthworm Books, 1998. (p.130)
[355] Refer Article 4 of ICCPR.
[356] General Comment 3 (Fifth Session 1990), Compilation of General Comments and General Recommendations Adopted by the Human Rights Treaty Bodies, UN Document, HRI/Gen/1/Rev.1, July 1994.

recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.'

Thus, obligations of States parties are expressed through the use of terms *'undertakes to take steps,' 'to the maximum available resources,' 'achieving progressively the full realization,' and 'by all appropriate means including particularly the adoption of legislative measures.'*

In contrast, these terms are not used in the civil and political rights Covenant. The Article 2(1) of the covenant on Civil and Political Rights states that, 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals.., the rights recognized in the present Covenant...' For this reason theorists contend that the Covenant on Economic, Social and Cultural Rights do not belong to the same genre as that of the Civil and Political Rights.

According to the Committee on Economic, Social and Cultural Rights the obligations of States parties include both obligation of conduct and obligation of result.[357]

Obligations of conduct mean that, a State has to undertake a specific step, act or omission[358] while obligation of result means attaining a particular outcome through active implementation of policies and programs. However, conduct and result cannot be separated. The concept of obligation of conduct and result provides an effective tool for monitoring the implementation of economic, social and cultural rights. It also shows that realization of economic, social and cultural rights is a dynamic process involving both immediate and long term intervention.[359]

The use of the term 'Each State Party .... Undertakes to take steps,' in Article 2(1) of the ICESC is normally construed as implying progressive implementation of the Covenant. However, it should be noted that a similar term is used in Article 2(2)

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[357]General Comment 3 (Fifth Session 1990), Compilation of General Comments and General Recommendations Adopted by the Human Rights Treaty Bodies, UN Document, HRI/Gen/1/Rev.1, July 1994.

[358] For example, prohibiting forced labour is an act of conduct.

[359] D.J. Ravindran, Human Rights Praxis: A Resource book for Study, Action and Reflection, Earthworm Books, 1998. (p.132)

of the ICCPR and in Article 2(1) of the Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment. Thus, the term cannot be construed to imply mere progressive implementation.[360] In fact, the Committee on Economic, Social and Cultural Rights has clarified that, 'while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned. Such steps should be *deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.*'[361]

The Committee on Economic, Social and Cultural Rights has recognized that States must decide the appropriate means and it may depend on the right that is being implemented. However, the Committee has stated that, 'States parties reports should indicate not only the measures that have been taken but also the basis on which they are considered to be the most "appropriate" under the circumstances.'[362]

It is clear from the interpretation given by the Committee that the term 'all appropriate means' is linked to both conduct and result. A State party cannot avoid its obligations by merely saying that its policies are aimed at economic development and poverty or illiteracy will be eradicated eventually.

As for the term 'adoption of legislative measures,' the Committee has stated that it by no means exhausts the obligation of State parties. A mere existence of laws is not sufficient to prove that a State party is carrying out its obligation under the Covenant. For example, while considering the Canadian report, a member of the Committee commented that, 'when reports focused too narrowly on legal aspects, the suspicion naturally arose that there might be some gap between law and practice.'[363]

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[360] Mathew Craven, The International Covenant on Economic, Social and Cultural Rights-A Perspective on its Development, Clarendon Press, Oxford, 1994(p.125)

[361] Ibid

[362] Ibid

[363] See D.J. Ravindran, Human Rights Praxis: A Resource book for Study, Action and Reflection, Earthworm Books, 1998. (p.132)

In addition to laws, the Committee has also stressed the need for 'provision of judicial remedies with respect to rights which may, in accordance with the national legal system, be considered justiciable.'

It is normally assumed that due to the resources required for the realization of economic, social and cultural rights, they are incapable of immediate implementation. On the other hand, the Committee has stated that,

'The fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the raison d'etre, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal."

The Committee has made it clear that 'progressive realization' is *not* an escape clause. Such an interpretation provides activists an important conceptual perspective against the notion of 'gradualism' in economic policies. It means that, ensuring social welfare is a gradual long-term process where the growth of the economy will percolate to everyone. However, most often growth becomes an end in itself whether it is socially desirable or not. The position of the Committee seems to be that the process of economic growth should be combined with the realization of human rights.'

The Committee has also concluded that 'progressive realization' includes not only continuous improvement but also the obligation to ensure that there are not regressive developments. The Committee has stated that, 'any deliberately retrogressive measures.... would require the most careful consideration and would

need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum of available resources.'[364]

The notion that economic resources are essential for the implementation of economic, social and cultural rights has been the major justification for considering it secondary to civil and political rights. The Committee has acknowledged the importance of resources in fulfilling the rights but does not consider that resource availability as an escape clause. For example, it has stated that 'in cases where significant numbers of people live in poverty and hunger, it is for the State to show that its failure to provide for the persons concerned was beyond its control.'[365]

The Committee developed the idea of 'minimum core obligations' to refute the argument that lack of resources hinders fulfillment of obligations. The Committee has observed that every State has a minimum core obligation to satisfy minimum essential levels of each right of the Covenant. It has clarified that a State party ' in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is prima facie, failing to discharge its obligations under the Covenant.....In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.'[366]

The Committee has made it clear that, 'even where the available resources are demonstrably inadequate, the obligations remains for a State party to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstance.' In addition, the Committee has also stated that, even in times of severe resource constraints... vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes.'[367]

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[364] D.J. Ravindran, Human Rights Praxis: A Resource book for Study, Action and Reflection, Earthworm Books, 1998. (p.133 , 134)
[365] Ibid
[366] Ibid
[367] Ibid

PART IV of the Constitution of India covers Directive Principles of State Policy[368]. Article 37 states that –"The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless laws fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws".

The above Article stresses the directory nature of provisions relating to the ESC rights set out in PART IV. The reason underlying the non-enforceability of these principles is that they impose positive obligations on the State plagued often by financial crunches. In contrast Article 13, in PART III of the Indian Constitution that covers Civil And Political Rights emphatically state in clause 2 that-

'The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void'. At the time the Constitution came into force in India PART IV Rights were considered to be subordinate to PART III Rights. The Supreme Court too affirmed this view on several occasions; as in Re *M. Thomas*, AIR 1953 Mad 21; *Gadadhar* v *State of West Bengal*, AIR 1963 Cal 565 and *Ranjan Dwivedi* v *Union of India*, AIR 1983 SC 624.Adopting a strict and literal interpretation of Art.37 the Apex Court further ruled that Directive Principles could nor override Fundamental Rights and, that in case of conflict between the two, the Fundamental Right would prevail over the Directive Principles. This point was settled by the Supreme Court in *State of Madras v Champakam Dorairajan* where a government order in conflict with Art.29(2), a Fundamental Right, was declared invalid, although the government did argue that it was made in pursuance of Art.46, a Directive Principle.

Besides, the wording of the provisions in this Part indicates their lack of enforceability. For instance the obligations of States parties in PART IV are expressed through the use of terms like-

[368] Refer Annexure VIII-D for the full text of PART IV of the Constitution of India.

'The State shall strive', [369]

The State shall, in particular, strive[370]*....*

The State shall, in particular, direct its policy towards securing[371]*....*

The State shall, within the limits of its economic capacity and development, make effective provision[372]*....*

The State shall ***endeavour*** *to secure, by suitable legislation or economic organisation or in any other way,*[373] *shall endeavour to organise*[374]*,*

The State shall endeavour to secure for the citizens[375]*...etc.*

The use of such terminology, theorists argue indicate the loop holes and merely directory nature of ESC Rights and point out that ESC Rights do not belong to the same genre as Civil and Political Rights.

Dr.Ambedkar while addressing the Constituent Assembly pointed out that the enforceability of these principles was left to the political process and declared that a government which failed to implement these principles would stand to lose in the next elections.

With the passage of time however Courts began to lay greater emphasis on the fulfillment of the goals laid down in PART IV. As early as in 1958, in *Kerala Education Bill*[376], Das, C.J., while affirming the primacy of Fundamental Rights over Directive Principles, qualified the same by pleading for a harmonious interpretation of the two.

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[369] Refer Art.38.
[370] Refer Art. 38(2).
[371] Refer Art. 39.
[372] Refer Art. 41
[373] Art.43
[374] Art. 48
[375] Art.44
[376] AIR 1958 SC 956

In time judicial attitude became more positive and affirmative towards Directive Principles with Courts declaring that they are "complementary and supplementary to each other".[377]

The Twenty fifth Amendment Act of the Constitution inserted Art.31C which read that-

Notwithstanding anything contained in article 13, no law giving effect to the policy of the State towards securing the principles specified in clause (b) or clause (c) of article 39 shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14 or article 19.

This amendment of the Constitution placed Art.39 clause (b) and Art.39 clause (c) on a higher pedestal than even the fundamental rights regarding equality and personal freedoms set out in Art14 and 19 respectively by declaring that no law giving effect to the policy of the State towards securing the principles specified in clause (b) or clause (c) of article 39 shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14 or article 19.

The twenty-fifth Amendment Act was challenged subsequently in *Kesavananda* where the Supreme Court upheld its validity. This period also witnessed a phase where the Supreme Court in numerous judgments interpreted fundamental rights in the light of the Directive Principles. In *Pathumma v State of Kerala*[378] the Supreme Court declared that the Constitution aims at bringing about synthesis between Fundamental Rights and Directive Principles.

The Forty Second Amendment Act, of 1976 went all out to strengthen the scope and ambit of Directive Principles of State Policy. The Amended Article 31C read as follow-

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[377] Chandra Bhavan Boarding and Lodging, Bangalore v State of Mysore, AIR 1970 SC 2042
[378] AIR 1978 SC 771.

31C. Saving of laws giving effect to certain directive principles.— Notwithstanding anything contained in article 13, no law giving effect to the policy of the State towards securing *[all or any of the principles laid down in Part IV] shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14 or article 19; ***and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy:*

Provided that where such law is made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.

* Subs. by the Constitution (Forty-second Amendment) Act, 1976, s. 4, for "the principles specified in clause (b) or clause (c) of article 39" (w.e.f. 3.1.1977). Section 4 has been declared invalid by the Supreme Court in *Minerva Mills Ltd. and others* vs. *Union of India and others* (1980) s. 2, S.C.C. 591

** In *Kesavananda Bharati* vs. *the State of Kerala* (1973), Supp. S.C.R.1., the Supreme Court held the provisions in italics to be invalid.

A study of Article 31C, pursuant to the 42nd Amendment clearly demonstrates how PART IV of the Constitution had over riding powers over the Fundamental Rights contained in PART III of the Constitution. But this position was not to remain for long, for, Section 4 of the 42nd Amendment Act was declared invalid by the Supreme Court in *Minerva Mills Ltd. and others* vs. *Union of India and others*[379] (1980) s. 2, S.C.C. 591 and in Kesavananda's case the Apex Court held that judicial review was part of the basic structure of the constitution and held the provisions in italics of Art 31C to be invalid. However The Apex Court however upheld the Twenty fifth Amendment Act, thus retaining the paramount nature of Articles 39(b) and (c) and declared that laws passed to give effect to these principles are valid even if they

[379] The main theme of this pronouncement was that the Constitution was based on the 'bedrock of balance' between Fundamental Rights and Directive Principles and to give one absolute primacy over the other would be to disturb this balance.

contravene the principles of equality enshrined inArt.14 and personal freedoms enshrined in Art.19 and this position holds good presently.

Having pointed out the growing recognition given to ESC rights in India, it would be pertinent at this juncture to examine the various ESC Rights and Directive Principles as interpreted by 'The Committee on Economic, Social and Cultural Rights'[380] and the Supreme Court of India respectively.

THE RIGHT TO WORK

ARTICLES 23 and 24 of the UDHR and ARTICLES 6 and 7 of ICESCR

'The right to work is of fundamental importance not only for its own sake but also because it can be the key to the enjoyment of many other rights for the individual concerned.'[381]

The rights under Art.6 and Art.7 of ICESCR echoes the principles of Art 23 of the UDHR.Art.6 incorporates two elements – access to employment and a right not to be arbitrarily deprived of employment. Access to employment includes equality of opportunity including non-discrimination, training and education. The right not to be deprived of employment includes safeguards against arbitrary dismissal. The words 'freely chooses' implies prohibition against forced labour.

Article 7, is supplementary to the right to work recognized under Article 6. Article 7 of ICESCR guarantees the right to fair wages, equal pay for equal work, nondiscrimination in employment conditions and safe and healthy conditions of work. In addition, Article 7, also includes the principles that women should be guaranteed 'conditions of work not inferior to those enjoyed by men.'

While the Indian Constitution does not expressly guarantee the right to work, the right of access to work[382], the right not to be arbitrarily deprived of employment[383]

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[380] (Hereinafter referred to as the Committee).
[381] Philip Alston, 'The International Covenant on Economic, Social and Cultural Rights, in Manual on Human Rights Reporting, United Nations Publications, Sales No.E.91.XIV.1
[382] Indira Sawhney v UOI
[383] C.B.Muthamma v UOI and Air India v Nargesh Meerza

and equality of opportunity with respect to public employment[384], including non-discrimination[385], the right to fair wages[386], equal pay for equal work[387], nondiscrimination in employment conditions[388] and safe and healthy conditions of work[389] have been protected under the Constitution.

THE RIGHT TO FORM AND JOIN TRADE UNIONS-

Art. 23 OF UDHR and Art. 8 of ICESCR

This right is recognized under Article 22 of the ICCPR, Para 4 of Article 23 of the UDHR and also under ILO Conventions (Number 87 and 98). Article 8 of ICESCR is different from these other instruments since it recognizes the right to strike which the other instruments do not provide for. All State parties are required to indicate 'whether the right to strike enjoys constitutional, legislative or other protection.'[390] The right to form and join trade unions also includes the right to federate and join international trade unions. The Committee on Economic, Social and Cultural Rights considers Article 8 of ICESCR to be capable of immediate application. However, Article 8 also provides for grounds for restriction of this right. The government of India while ratifying ICESCR expressed that the provisions of Article 8 shall be so applied as to be in conformity with the provisions of article 19 of the Constitution of India.

Article 19(1) (c) guarantees to all Indian citizens the right to form associations or unions subject to the reasonable restriction which may be imposed by Art.19 (4) in the interest of the sovereignty or integrity of India or in the interest of public order or morality. In KR.W. Union v Registrar, AIR 1967 Cal.507 the Court ruled that every workman under an employer had the right to form an association or union of his own choice and a union cannot complain, if another union is formed by other workmen. Similarly a worker cannot be forced to become a member of a Union against his will.

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[384] Dashratha Rama Rao v State of AP
[385] M.A. Baid v Union of India
[386] The Bandhua Mukti Morcha case
[387] Mackinon Mackenzee & Co. Ltd v Andrey D'Costa
[388] Kiran Bedi v Committee of Inquiry
[389] U.P.S.E. Board v Hari Shankar,AIR 1979 SC 65 AND D.B.M. Patnaik v State of A.P
[390] Ibid

It is equally pertinent to note that the right to form associations or unions guaranteed by Art19 (1) (c) does not include the right to strike or the right to declare lock-out.[391] In *All India Bank Employees' Association v. National Industrial Tribunal* it was contended that the right to form an association guaranteed by Article 19 (1) (c) of the Constitution, also carried with it the concomitant right to strike for otherwise the right to form association would be rendered illusory. The Supreme Court rejected this construction of the Constitution **and observed that,** "'to read each guaranteed right as involving the concomitant right necessary to achieve its object would lead to an almost grotesque result." Time and again the Apex Court has ruled that **the right to strike is not a fundamental right** and therefore the legislation regulating strike and lock- out is not controlled by Art19 (1) (c). On the contrary the right to strike or the right to lock-out may be controlled or restricted by appropriate industrial legislation.[392]

In August 2006, Justice M. B. Shah, speaking for a Bench of the Supreme Court consisting of himself and Justice A. R. Lakshmanan, while delivering the judgment in *T.K. Rangarajan v. Government of Tamilnadu and Others* (i), observed, "Now coming to the question of right to strike - in our view no such right exists with the government employee. The background to the filing of this PIL was that the Government of Tamil Nadu had suspended nearly two lakhs Government employees who went on strike, bringing the Government machinery to a standstill. The Court went further to state that Government servants had no 'moral or equitable justification to go on strike.' Not stopping with the case of Government employees, the Supreme Court referred to several categories of employees in the following words, "In case of strike by a teacher entire educational system suffers... In case of strike by doctors innocent patients suffer; in case of employees of transport services entire movement of the society comes to a standstill; business is adversely affected and number of persons find it difficult to attend to their work, to move from one place to another or from one city to another. On occasion public properties are destroyed... "

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[391] All India Bank Employees' Association v National Industrial Tribunal, AIR 1962 SC 171; Radhey Shyam v P.M.G., air 1965 sc 311; Raghubar Dayal v UOI, AIR 1962 SC 263;

[392] All India Bank Employees' Association v National Industrial Tribunal, AIR 1962 SC 171; Radhey Shyam v P.M.G., air 1965 sc 311; Raghubar Dayal v UOI, AIR 1962 SC 263; D.A.V. College v State of Punjab, AIR 1971 SC 1737

THE RIGHT TO SOCIAL SECURITY- ART.22 of UDHR; Art.9 of ICESCR

While the UDHR exhorts Member States to provide social security to every member of society through national efforts and international co-operation, The Committee of Economic, Social and Cultural Rights requires the State party to report specifically on the type of social security schemes that exist in their respective countries. The schemes identified by the Committee are: [393]Medical Care; Invalidity benefits; Old-age benefits; Employment injury benefits; Cash Sickness benefits; Unemployment benefits; Survivors' benefits; Family benefits; and Maternity benefits.

The Committee also seeks information on the percentage of GNP of national and/or regional budget(s) that is spent on social security. Thus the Committee stresses the importance of establishment of specific schemes and adequate budget allocation for ensuring the right to social security.

Article 41 and 43[394] of the Indian Constitution declares the responsibility of the State to provide for social security. Further Article 38(1) exhorts the State to strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life. The social justice contemplated in Art.38 is a dynamic device to mitigate the sufferings of the marginalized and 'deprived sections of society and to elevate them to a level of equality to live a life with dignity of person'.

That right to life includes right to social security was upheld by the Apex Court in Calcutta Electricity Supply Corporation v. Subhash Chandra Bose , AIR 1992 SC 573; Regional Directors ESI Corporation v Francis De Costa , (1993) Supp 4 SCC 100;and L.I.C of India v Consumer Education and Research Centre, AIR 1995 SC 1811.In the latter case (L.I.C of India) the Supreme Court ruled that the denial of acceptance of life insurance policies by the L.I.C of India on unreasonable grounds amounted to a violation of Article 21.

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[393] See note 25

[394]Refer Annexure VIII D (page lxxi) for the full text of the Articles 41 and 43 of the Indian Constitution

THE RIGHT TO AN ADEQUATE STANDARD OF LIVING- Art.25 of the UDHR and Art.11 of ICESCR-

Article 11 OF ICESCR, similar to Art 25 of the UDHR includes wide-ranging rights. It provides for the right to an adequate standard of living, the right to the continuous improvement of living conditions, and the rights to adequate food,[395] clothing and housing.

To gauge the adequacy of the standard of living the Committee seeks information on the current standard of living, of the population of the reporting state, both in the aggregate and with respect to different socio-economic, cultural and other groups within the society in member states. In addition, the Committee also seeks information regarding changes that have taken place in the standard of living over time. The Committee also seeks information regarding per capita GNP for the poorest 40 per cent of population and the basis for defining a "poverty line" if it is in existence.

In India, Article 39(a) of the Constitution enjoins the State to direct its policy towards securing that the citizens, men and women equally, have the right to an adequate means of livelihood. To this end, Articles 39(b) and (c) state that the that the ownership and control of the material resources of the community are to be so distributed as best to sub serve the common good; and that the operation of the economic system is not to result in the concentration of wealth and means of production to the common detriment; Article 47 of the Constitution imposes a duty on the State to raise the level of nutrition and the standard of living and to improve public health.

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[395] The Committee seeks the following information regarding the right to adequate food

'(a)The extent to which the right to adequate food has been realized and the sources of information that exist in this regard, including nutritional surveys and other monitoring arrangements.
(b) Detailed information (including statistical data broken down in terms of different geographical areas) on the extent to which hunger and/or malnutrition exists. (c) Information regarding, changes if any taken place during the reporting period with regard to national policies, laws and practices negatively affecting the access to adequate food by these groups or other sectors.
(d) Information regarding agrarian reform measures taken to ensure that the agrarian system is efficiently utilized in order to promote food security at household level without negatively affecting human dignity both in the rural and urban settings.

In *Air India Statutory Corporation v United Labour Union*, AIR 1997 SC 645, The Apex Court ruled that the State should provide facility and opportunity to enable workers reach at least minimum standard of health, economic security and civilized living...'

The Supreme Court in *Vincent Panikulangara v UOI*[396] read Arts. 47 and 21 together and did cull out an obligation of the state to provide better health services to the poor.

In *Paschim Banga Khet Mazdoor Samity*, observed that in a welfare state, the government has to provide adequate medical facilities for its people by running hospitals and health centers to cater to 'persons seeking to avail of these facilities'.

FOOD SECURITY AND RIGHT TO FOOD: Food security implies physical and economic access to food. Despite the success of the green revolution in Post Independent India and in spite of becoming self sufficient in basic food production, nearly 2 million Indian children die every year as a result of serious malnutrition and preventable diseases.[397]

The 1990s saw a shift in the PDS from a universal system to a targeted system in 1997, with the central aim of reducing the overall size and cost of the food distribution system. However, this did not work well. The reduced sales of subsidized food under the Targeted PDS combined with increased procurement by the Government swelled national food stocks, and led to huge increases in the costs of stocking food. This in turn "created the appalling paradox of huge excess stocks of food grain held with the FCI, adding to costs and therefore to the losses, leading to a substantially higher food subsidy, even as problems of hunger and malnutrition among the poor became more acute".

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[396] AIR 1987 SC990.

[397] Nearly half suffer from moderate or severe malnutrition, with 47 per cent of children underweight and 46 per cent stunted in their growth. This is one of the highest levels of child malnutrition in the world, higher than most countries in Sub-Saharan Africa. It is estimated that the poorest 30 per cent of households eat less than 1,700 kilocalories per day per person (well below the international minimum standard of 2,100 kilocalories per day)**9** even if they spend 70 per cent of their income on food. *Source*: Jha, S., Deininger, D.U., *Public Expenditure on Food and Nutrition Security Programs in India: Are They Meeting the Challenge?*, 2003, p. 2.

In the year 2000 the press reported on people dying from starvation, in thirteen States in India, especially in the drought-stricken regions of Rajasthan, and in parts of Orissa, while food rotted in the government storage facilities. Reports suggested that food was being thrown into the sea or exported internationally at highly subsidized prices to reduce storage costs rather than being distributed to the hungry and starving. With growing public outrage at the paradox of starvation amidst overflowing food stocks, a public interest litigation was launched by People's Union for Civil Liberties (PUCL) against the Government of India in the Supreme Court. PUCL petition argued that the right to food was part of the right to life of all Indian citizens and demanded that the country's food stocks be used without delay to prevent hunger and starvation. Interim orders page 9 of the Supreme Court ordered assistance be extended to those at risk of starvation. The Court ordered the full implementation of all the food-based schemes across India This landmark case has brought the issue of the right to food as a human right back into public debate.

In 2005, two important new laws having a bearing on the right to food were adopted by the Indian Parliament namely The Right to Information Act that guaranteed the right to information to all citizens and recognized many correlative obligations at all levels of government, to improve transparency and accountability and the passing of the National Rural Employment Guarantee Act,[398] which recognizes employment as a matter of right for the first time. The *PUCL case* represents a great advance in the justiciability of the right to food as a human right, as the orders of the Supreme Court in this case have transformed the policy choices of the Government into enforceable, justiciable rights of the people. Although this relates primarily to the obligation to fulfill the right to food, the Court has also made judgments that are related to the obligations to respect and to protect the right to food. It has, for example, protected the right to water of Dalits against discrimination by the upper castes,[399] the right to livelihood of traditional fisher people against the shrimp

[398] It entitles anyone to be employed on public works within 15 days as unskilled manual labour at the statutory minimum wage, although this is restricted to rural areas and to a maximum of 100 days of work per household per year.
[399] SC, *State of Karnataka v. Appa Balu Ingale*, 1993.

industry (*Aquaculture case*),[400] and the right to livelihood of scheduled tribes against the acquisition of land by a private company (*Samatha case*).[401] For the Supreme Court, "any person who is deprived of his right to livelihood except according to just and fair procedure established by law, can challenge the deprivation as offending the right to life conferred by article 21".[402] It is now essential that small farmers who are arbitrarily evicted from their land, or women or members of the Scheduled Castes or Scheduled Tribes who are deprived of their access to productive resources, should have the same access to justice before the Supreme Court.

THE RIGHT TO SHELTER: The Supreme Court of India in M/s.Shantistar Builders v. Narayan Khimalal Totame, AIR 1990 SC 630 : (1990) 1 SCC 520; and in UP Avas Evam Vikas Parishad v. Friends Co-op., Housing Society Ltd, AIR 1996 SC 114; declared that right to shelter is a fundamental right which springs from the right to residence under Art.19(e) and the right to life under Art.21 of the Constitution read with Art.39(b) which mandates the ownership and control of material resources to sub serve the common good and Art.46 enjoining the State to promote with special care social, economic and educational interests of the weaker sections of society. However even while recognizing the right to livelihood in Olga Tellis[403], the Supreme Court declared that no person had a right to encroach on public property.

The Committee on Economic, Social and Cultural Rights in its General Comments adopted in 1991, had stated that 'instances of forced eviction are prima facie incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law.'

The Committee In General Comment 7 has observed- (in Para 11): 'Women, children, youth, older persons, indigenous people, ethnic and other minorities, and other vulnerable individuals and groups all suffer disproportionately from the practice

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[400] SC, S. Jagannath v. Union of India, 1996.
[401] SC, *Samatha v. State of Andhra Pradesh*, 1997
[402] Refer SC, *Olga Tellis*.
[403] AIR 1986 SC 180

of forced evictions.' and proposed that the least that needed to be done was to provide a procedure to precede forced evictions, where forced eviction cannot be avoided.[404]

All persons carrying out the eviction have to be properly identified and legal remedies and legal aid have to be provided to affected parties.

The obligation of State was spelt out in Para 17 and requires that evictions should not result in rendering individuals homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, it is for the State parties to take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available.

The Indian Constitution recognizes the 'Doctrine of Eminent Domain'[405] and allows the State to acquire property for public purposes. However the Supreme Court has time and again held that all forced evictions have to be carried out according to a procedure which is reasonable and fair. In *Olga Tellis*[406] while holding that the Pavement dwellers in Bombay had no legal right to encroach on public road and public property the Court never the less ordered the municipality to rehabilitate the hawkers and ordered the evictions to be conducted only after the monsoon season. In *Narmada Bachao Andolan* v *Union of India* the Supreme Court while issuing its final verdict on October 18, 2000 allowed construction of the Sardar Sarovar Project (SSP) up to its planned height of 138.68 metres. The submergence from increasing the height of the dam would impose in its wake the forced displacement of over 35,000 families.

The Court stipulated that the height of the dam would be allowed to increase by 5–meter increments, subject to clearance by the several controlling authorities. The Supreme Court also upheld the Narmada Water Dispute Tribunal Award (NWDTA) condition that adequate resettlement must precede submergence by at least six

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[404] These procedural protections include (Para 16) and cover opportunity for genuine consultation with those affected; All persons carrying out the eviction have to be properly identified and legal remedies and legal aid have to be provided to affected parties.

[405] Refer Article 31 A

[406] AIR 1986 SC 180.

months, and that replacement land should be made available to the ousted at least one year in advance of submergence (Clause IX, Sub clause IV(2)(iv) and Sub clause IV(6)(i)). The more recent Supreme Court order of 15 March 2005, reiterated that submergence under the SSP cannot take place till the affected people are given cultivable land.

THE RIGHT TO HEALTH- Article 25 of UDHR and Article 12 of ICESCR

Health is a Fundamental Human Right according to Article 25 of Universal Declaration of Human Rights while Article 11 of the ICESCR enjoins the State parties to recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. The Committee on Economic, Social and Cultural Rights has sought to elaborate the scope of Art.12 by stating that the right to health includes 'the right to a safe and healthy environment'.

Despite being signatory to Alma Ata declaration as well, the goal of 'health for all' remains elusive to most Indians.

However it is now well established that the right to life and personal liberty guaranteed in Art.21 of the Constitution of India includes right to health and medical care.

In *Paramanada Katara v UOI*, The Supreme Court declared that it is the duty of all doctors, whether belonging to government service or having private practice to extend medical aid to the injured to preserve life without waiting for the legal formalities to be complied with the police under the Criminal Procedure Code.

In *Paschim Banga Khet Mazdoor Samiti v State of West Bengal*, the Supreme Court held that the denial of medical aid by Government hospitals on the ground that beds are not available amounts to violation of Art.21. In this case the State was directed to pay compensation to the petitioner.

The Court adopted a similar position in Consumer Education and Research Centre v UOI and in State of Punjab v Mohindra Singh Chawla and declared in both

cases that the State had a constitutional obligation to provide adequate medical services to the people.

In *Kirloskar Brothers v Employee's State Insurance Corporation* the Apex Court reaffirmed that the right to health is implicit in right to life and is a fundamental right of every workmen whether employed in the government or public sector or belonging to the private sector.

THE RIGHT TO EDUCATION- Article 26 of the UDHR and Article 13 of ICESCR

Article 26 of UDHR and the corresponding Art 13 of ICESCR deal with the right to education in all its dimensions. The Committee on ESC Rights seeks information regarding education provided at primary, secondary, tertiary level and adult education programmes. Under the Covenant, State parties should provide free and compulsory primary education. The Covenant requires that a State party take precise measures to fulfill this obligation. Provision of primary education should be carried out immediately and is not covered by the progressive realization clause.

In India when the Constitution came into force the Right to Education was placed under PART IV of the Constitution and referred to in Article 41 and 45. While under Art.41The State had to within the limits of its economic capacity and development, make effective provision for securing education, under Art.45 the State had to endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years. It is pertinent to note that a time frame was fixed for the purpose of attaining this objective.

While the *Kerala Education Bill* gave enormous powers to the State Government to regulate educational institutions, the Court never the less conceded the right of minorities to establish and administer educational institutions of their choice, holding the latter right to be a fundamental right. As early as in 1958, in *Kerala*

Education Bill[407], Das, C.J., while affirming the primacy of Fundamental Rights over Directive Principles, qualified the same by pleading for a harmonious interpretation of the two. With time, in *Mohini Jain v State of Karnataka*,[408] the Supreme Court while holding that the charging of capitation fee is discriminatory, declared that the right to education was implicit in the right to life under Art.21and observed that if the right to education under Article 41 and 45 were not made a reality, fundamental rights would be an illusion to the vast majority of illiterate masses and the right to life would be devoid of dignity. The Court in the instant case took a very expansive view of the obligation of the State to provide education to every one at all levels.

The matter whether the State could charge capitation fee in Private Colleges came up for reconsideration in Unnikrishnan.[409]While the Court reiterated the obligation of the State to provide for education the Apex Court never the less limited the obligation of the State to providing for free and compulsory education till the age of fourteen and declared that beyond that stage the obligation of the State is contingent 'on the limits of its economic capacity and development'

In 2002 by virtue of the Eighty-Sixth Constitutional Amendment Act, Article 21A was inserted into the Constitution whereby the right to Education was declared to be a fundamental Right. This Article provides that the State shall provide free and compulsory education to all children of the age of 6 to 14 years in a manner that the State may, by law, determine.

In place of the original Article 45 a new Article was substituted which stated that the State shall endeavour to provide early childhood care and education for all children until they complete the age of 6 years.

In Article 51A after clause (j) a new clause (k) has been added. The provision of this clause reads as follows- It shall be the duty of every citizen of India who is a parent or a guardian to provide opportunities for education to his children or, as the case may be, ward, between the age of six and fourteen years.

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[407] AIR 1958 SC 956
[408] AIR 1992 SC 1858.
[409] Unnikrishnan v State of A.P, AIR 1993 SC 2178.

Reservation in educational institutions: In India reservation is a form of affirmative action whereby a percentage of seats are reserved in all public and private educational institutions, except in the religious/ linguistic minority educational institutions, for the socially and educationally backward classes of citizens and the Scheduled Castes and Scheduled Tribes. The stamp of positive discrimination was evident in Art.15 (3) originally contained in the Constitution and enabled the state to make special provisions for women and children. Though the Court in Champakam Dorairajan[410]struck down a government order which disqualified the petitioner in preference to a low caste candidate upholding the principle of equality under Article 14, the Parliament responded by amending the Constitution[411] and inserting Art.15 (4) thereby providing for the advancement of socially and educationally backward classes of citizens. Article 15(5) was inserted vide The 93rd Amendment Act, 2005 and extended reservation to private educational institutions, except in the religious/ linguistic minority educational institutions.

More recently, in April 2008 while deciding the case of *Ashoka Kumar Thakur versus the Union of India and Ors* in which the 93rd Amendment Act, 2005 and the Central Educational Institutions (Reservation in Admission) Act, 2006 stood challenged, the Supreme Court upheld the exclusion of the 'creamy layer 'from reservation of seats in educational institutions. On the central question of the definition of backward class and its identification, especially the validity of using caste to identify class, the Supreme Court reiterated that it arrived at a point in *Indra Sawhney*, after a string of cases starting with *Champakam Dorairajan*, that caste could be the starting point for determining socially and educationally backward classes.[412]

CULTURAL RIGHTS:

Article 15(1) of the ICESCR protects the right of everyone to take part in cultural life. Article 15 of ICESCR is a reflection of Article 27 of the UDHR. The

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[410] (1951) SCR 525
[411] Constitution (1st Amendment) Act 1951
[412] Refer THE HINDU, Friday, April 18,2008, page 14,'Road map for reservation in higher education' by Kalpana Kannabiran

third part of both these Articles seeks to protect Intellectual Property Rights while the first two parts enable everyone to partake in cultural life and enjoy the benefits of scientific progress and its applications.

Under Article 29 clause 1 of the Constitution of India, any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same. The right guaranteed under Art.29(1) is available to any section of citizens, whether they belong to the majority or minority, provided such section has a distinct language, script or culture of its own. The right under Art.29 (1) is not subject to any reasonable restriction and the right to conserve the language has been held by the Court to also include the right to agitate for the protection of the language.[413]

Further Art.51A in PART IV-A of the Constitution in clause (f), requires every citizen to value and preserve the rich heritage of India's composite culture. In national and cultural interest, Article 49 of the Constitution requires the State to protect every monument or place or object of artistic or historic interest, declared by or under law made by Parliament to be of national importance, from spoliation, disfigurement, destruction, removal, disposal or export, as the case may be.

To sum up the Constitution of India indeed reflects the ESC provisions contained in the IBR.[414] The doctrine of 'minimum core content' has been recognised by the Apex Court in India as early as in *Ratlam*,[415] where Justice V.R. Krishna Iyer rejected the plea of the Municipality of its inability to carry out its statutory duties on the ground of lack of finances. The court declared that the State cannot take shelter under lack of resources or cite the ground of absence of economic capacity and have a duty to provide for not state of art facilities but certainly basic amenities. Like wise the numerous decisions of the APEX Court are in conformity with the Limburg Principles and quite similar to the position under International Law, in India too the rights contained in PART IV of the Constitution have increasingly been read by the judiciary to be implicit in the Fundamental Rights contained in PART III of the

[413] Jagdev Singh v Pratap Singh Daulata, AIR 1965 SC 183.
[414] Refer Table I for the consonance the Constitution of India bears to the International Bill of Rights.
[415] Municipal Council of Ratlam v Vardhichand, AIR 1980 SC 1622

Constitution and therefore been rendered enforceable. What is more the Apex Court has categorically affirmed that the Directive Principles of PART IV which embrace ESC Rights are no longer subordinate to PART III Rights but on the contrary are on par with the Fundamental Rights contained in the Third Part of the Constitution. The Supreme Court was also able to effectively thwart the attempt of the legislature through the Forty Second Amendment Act of the Constitution to give over riding effect to the Directive Principles over Fundamental Rights through an Amendment of Article 31C, by declaring that such an Amendment would upset the basic structure of the Constitution and in declaring the right of judicial review to be part of the basic structure of the Constitution the Judiciary in India indeed has the last word or say over declaring the validity of all the Constitutional provisions.